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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 149

GREAT NORTHERN RAILWAY COMPANY,
Petitioner, and Appellant below

vs.

UNITED STATES OF AMERICA,
Respondent, and Appellee below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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TO THE HONORABLE THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This proceeding originated by suit in the District Court of the United States for the District of Montana, brought

by the United States to enjoin petitioner from drilling for oil upon a section of its right of way in Glacier County, Montana. The right of way in question was granted by the United States under the general Congressional right-of-way grant of March 3, 1875 (18 Stat. 482), and the only question involved is whether under such Congressional grant the Railway Company, grantee, is entitled to remove any oil which may underlie the right of way, either for sale or for use as fuel upon its locomotives. The District Court granted a motion by the United States for judgment on the pleadings, and issued the injunction as prayed for. This judgment was affirmed by the Circuit Court of Appeals of the Ninth Circuit, Judge Wilbur dissenting.

BASIS OF THIS COURT'S JURISDICTION.

The jurisdiction of the Supreme Court to review the judgment of the Circuit Court of Appeals by writ of certiorari is sustained by the United States Judicial Code, Section 240 (43 Stat. 938). Judgment of the Circuit Court of Appeals was entered on May 8, 1941. This petition will be filed on or before June 9, 1941. The issuance of mandate from the Circuit Court of Appeals has been stayed until July 7, 1941 (R. 157).

The jurisdiction of the District Court was based upon the fact that the United States was plaintiff, and upon United States Revised Statutes Sections 563 and 629 and amendments thereto, now being Section 41, Title 28, United States Code. Jurisdiction of the Circuit Court of Appeals was based upon Section 225, Title 28, United States Code, 26 Stat. 828, 36 Stat. 1133, 38 Stat. 803, 43 Stat. 813, 936.

FEDERAL QUESTION PRESENTED.

The specific Federal question presented by this petition is whether a railroad company, having obtained a right of way through the public lands under the Act of March 3, 1875, is entitled to remove any oil which may underlie such right of way, either (1) for sale or other general disposition, or (2) for use as fuel upon railroad locomotives operating over such right of way.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

The reasons relied on for allowance of the writ are:

(1) That the Circuit Court of Appeals has decided an important question of Federal law in conflict with applicable decisions of this Court.

The question of Federal law is highly important, because several hundred thousand miles of right of way have been granted under the same granting act, or other acts containing the same granting words, and thousands of acres of such right of way lie in oil bearing or mineral bearing districts. It is probable that the oil and mineral values underlying such rights of way aggregate many millions of dollars, and it is clearly in the interest of the United States, as well as in the interest of the railroad grantees and patentees of adjoining lands holding reversionary rights in the rights of way, that officers of the United States Land Department and of the railroads and adjoining property owners, should know definitely whether the minerals underlying the rights of way remained in the United States or passed to the grantees of the right of way.

It is believed that the decision of the Circuit Court of Appeals is in conflict with a dozen applicable decisions of this Court, cited in the accompanying brief, and holding that the land within the right of way strip granted by this Act and by similar granting clauses in other acts, is granted to and held by the railway company in fee simple, conditioned only upon its continued use for railroad purposes. While none of these decisions involves the specific question of the right to drill for oil, they do declare that the right of way strips were granted in fee, and that the grantees had all of the rights of a fee owner, and this would necessarily include the right to remove underlying oil. For example, in *Rio Grande Western R. Co. v. Stringham,* 239 U. S. 44, 60 L. Ed. 136, 36 S. Ct. 5, there was involved a question whether the railway company could enjoin the removal of minerals underlying its right of way strip granted under the act of March 3, 1875, where the grant of a mineral patentee overlapped the right of way. The Court said:

> "The right of way granted by this and similar acts is neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted, *and carries with it the incidents and remedies usually attending the fee.*" (Italics in this brief supplied by us, unless otherwise specified).

(2) That the decision of the Circuit Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the 7th Circuit in *Carter Oil Co. v. Welker,* 112 Fed. (2d) 299, decided November 6, 1939. The right

of way strip involved in the latter case was obtained by private deed, but it was granted "for railroad purposes" and the court held that the railway company had the right to drill for oil on its right of way. While the decision in the case at bar involved a Congressional grant instead of a private deed, both cases involve the specific question of the right of a railway company to drill for oil on its right of way and the two courts have reached directly opposite conclusions under the respective facts presented to them.

(3) If it should be held that the decision of the Circuit Court of Appeals is not in conflict with the decisions of this Court, above referred to, upon the ground that those decisions do not involve the specific question of the right to remove oil, then it is submitted that the writ should be granted upon the ground that the Circuit Court of Appeals has decided an important Federal question, which has not been but should be settled by this Court, and which arises in several circuits other than the Ninth Circuit, and that neither the officers of the Land Department nor of the grantees nor adjoining land owners can know definitely, without a decision of this Court, whether the oil and minerals underlying the rights of way passed from the Government to the grantees.

(4) In the ninety years which have elapsed since the granting clause used in the Act of 1875 was first enacted by Congress, the decisions of the District Court, and of the Circuit Court of Appeals in this case are the first decisions of any court, state or federal, in which it has been held that the estate granted in the railroad right of way was anything less than a fee simple ownership of the entire

corpus of the land, conditioned only upon its continued use for railroad purposes.

(5) The decision of the Circuit Court of Appeals that the estate granted by the Act of March 3, 1875, is only an easement, is in conflict with admissions in the Government's brief that the estate granted by identical granting clauses in earlier Congressional grants, was a fee. There is no sound reason for attributing diametrically opposite effects to the same identical words in the earlier and later acts, and the decision of the court, coupled with the contrary admissions of the Government, create confusion and uncertainty as to the effect of the granting clause in this and earlier grants.

(6) The decision of the Circuit Court of Appeals was not unanimous. There was a very able and well considered dissent by Judge Wilbur. It is submitted that his decision is better reasoned than the opinion of the majority, and that his dissent accords with, while the decision of the majority conflicts with, the applicable decisions of this Court, the weight of judicial authority, and the plain intention of Congress as manifested in several provisions of the statutory grants.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this court directed to the Circuit Court of Appeals for the Ninth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its equity docket No. 9624, Great Northern Railway Company, Appellant, vs. United States of America, Appellee, to the end that this cause may be reviewed and

determined by the Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by this Court, and for such further relief as to this court may seem proper.

Respectfully submitted,

GREAT NORTHERN RAILWAY COMPANY,

By F. G. DORETY,

WEIR, CLIFT & BENNETT,

Attorneys for Petitioner.

Dated May 28, 1941.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

GREAT NORTHERN RAILWAY COMPANY,
Petitioner, and Appellant below,

vs.

UNITED STATES OF AMERICA,
Respondent; and Appellee below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the District Court of the United States for the District of Montana, has been officially reported in 32 F. Supp. 651.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit, dated May 8, 1941, has not yet appeared in the published reports, and will be found on pages 120 to 157 in the record.

JURISDICTION.

The jurisdiction of the Supreme Court to review the judgment of the Circuit Court of Appeals by writ of certiorari is sustained by the United States Judicial Code, Section 240 (43 Stat. 938). Judgment of the Circuit Court of Appeals was entered on May 8, 1941. The petition herein will be filed on or before June 9, 1941. The issuance of mandate from the Circuit Court of Appeals has been stayed until July 7, 1941 (R. 157).

The jurisdiction of the District Court was based upon the fact that the United States was plaintiff, and upon United States Revised Statutes, Sections 563 and 629, and amendments thereto, now being Section 41, Title 28, United States Code. Jurisdiction of the Circuit Court of Appeals was based upon Section 225, Title 28, United States Code, 26 Stat. 828, 36 Stat. 1133, 38 Stat. 803, 43 Stat. 813, 936.

STATEMENT OF THE CASE.

The case was submitted to and decided by the District Court upon the Government's motion for judgment on the pleadings (R. 10).

The only allegations in the complaint which need be considered here are the allegations that the petitioner obtained certain described right of way by grant from the United States under the Act of March 3, 1875, that by reason of said grant, it asserts ownership of the oils and minerals underlying the same and threatens to use portions of such right of way for the purpose of drilling for and removing subsurface oil, and that no lease or permit has been issued

by the Government for such purpose (R. 3-6). The answer admits the above mentioned allegations, and alleges affirmatively that oil suitable for locomotive fuel exists under the said right of way and can be economically removed, and that the petitioner intends to and will, unless restrained by the court, drill three separate wells upon the right of way, the proceeds of No. 1 to be sold commercially, the proceeds of No. 2 to be refined and the residue used for locomotive fuel, and the proceeds from well No. 3 to be used in their entirety as fuel upon petitioner's locomotives (R. 8 and 9).

There was no allegation that the threatened drilling for oil by the petitioner would interfere in the slightest with its full and complete use of the right of way for railroad purposes.

There were no further pleadings, and the motion for judgment was based upon the complaint and answer above summarized.

The text of the Act of March 3, 1875, under which the grant in question was made, is set forth as Appendix A to this brief.

SPECIFICATION OF ERRORS.

(1) The Circuit Court of Appeals erred in failing to hold that the term "right of way" as used in the Act of March 3, 1875, meant "strip of land", and that the grant was a grant of the land itself with all of the incidents of fee ownership, including the ownership of any underlying oil.

(2) The Circuit Court of Appeals erred in finding that it was not the purpose of Congress in passing the Act of March 3, 1875, to grant anything but surface rights, and that no ownership in oil or minerals underlying the right of way passed by the grant.

(3) The Circuit Court of Appeals erred in affirming the decision of the District Court and in failing to reverse that decision and to direct that the injunction prayed for in the complaint be denied.

(4) The Circuit Court of Appeals erred in failing to direct that the injunction prayed for in the complaint be denied, at least as to the removal by petitioner of oil for use upon railroad locomotives operated upon the right of way granted under the Act.

ARGUMENT.

The granting words of the Act of March 3, 1875, are: "the right of way through the public lands of the United States is hereby granted to any railroad company * * * to the extent of one hundred feet on each side of the central line of said road." The full text of the act appears in Appendix A.

The controlling question seems to be, what did the term "right of way" mean when used in railroad legislation during the period of the railroad grants? Was it the equivalent of the term "strip of land" or did it mean "easement" or was it susceptible to either or both interpretations?

During and prior to the period of the Congressional grants, "right of way", as used in legislative enactments invariably meant the strip of land owned in fee.

While it has become common in many states in the last half century to consider the estate of a railroad in its right of way, especially when obtained by condemnation, not as a fee but as including only such rights in land as are necessary for the construction and operation of the railroad, it appears from earlier statutes and judicial decisions that prior to and during the period of the Congressional grants, the idea that a railroad might be built upon an easement had hardly been thought of, and it was the almost universal practice to regard a railroad right of way as a fee simple estate.

A clause granting a "right of way through the public lands of the United States" was first enacted in the grants to Atlantic & Gulf Railroad Company, and the Mobile & Ohio Railroad Company, by Acts of March 3, 1849 (9 Stat. 771, 772), and the same or similar granting clauses were re-enacted in about a dozen other grants during the period from 1850 to 1875.[1]

During and prior to the period of these grants the idea that a railroad might be constructed upon an easement, or

[1] Atlantic and Gulf, and Mobile and Ohio, March 3, 1849, 9 Stat. 771, 772.
Illinois Central Grant, September 20, 1850, 9 Stat. 466.
Union Pacific Grant, July 1, 1862, 12 Stat. 489.
Amended Union Pacific Grant, July 2, 1864, 13 Stat. 356.
Northern Pacific Grant, July 2, 1864, 13 Stat. 365.
Placerville Grant, July 13, 1866, 14 Stat. 94.
Leavenworth City Grant, July 23, 1866, 14 Stat. 212.
California & Oregon R. R. Grant, July 25, 1866, 14 Stat. 239.
Atlantic & Pacific R. R. Grant, July 27, 1866, 14 Stat. 292.
Stockton R. R. Grant, March 3, 1871, 16 Stat. 573.
Green Bay and Lake Pepin R. R. Grant, March 3, 1871, 16 Stat. 588.
Portland, Dalles & Salt Lake R. R. Grant, April 12, 1872, 17 Stat. 52.
Central Pacific R. R. Grant, Feb. 5, 1875, 18 Stat. 306.

upon a mere surface ownership, or any ownership less than a fee, does not appear either in legislative acts or judicial decisions. It seems to have been assumed that the site for a railroad, like the site for a factory, farm or home, should normally be owned in fee simple. It appears that during and prior to the period of the grants, the term "railroad right of way" had only one accepted meaning in legislative enactments. It was never used during that period as designating an easement and was universally used as a brief means of describing the narrow strip of land owned by a railroad company in fee, and upon which the tracks were constructed.

Between 1827 and 1875 some 68 statutes or special acts were passed in 28 states or territories, permitting railroad companies to acquire the land itself or a fee simple estate in their rights of way. A large majority—47 acts in 13 states—declared specifically that the decree should vest in the company "the fee simple of the land" or that "the lands (or right of way) shall vest (or be vested) in the company in fee simple", or "shall vest the right of fee simple to the said strip or strips of land in the railway company".[1] Some included the word "absolutely" or "full and complete title",[2] and some used the word "forever".[3] Only three of them said "for public purposes" or limited the estate to the life of the corporation.[4]

Ten other statutes in nine states declared that the "real estate" or "land", or "title to the land" shall vest in the company. These statutes did not use the words "fee sim-

[1]See statutes listed in Note 1, Appendix B to this brief.
[2]See statutes listed in Note 2, Appendix B to this brief.
[3]See statutes listed in Note 3, Appendix B to this brief.
[4]See statutes listed in Note 4, Appendix B to this brief.

ple" but they vested in the company the land and not a mere right in or user of the land.[5]

Two statutes expressly required that the award should include not only the value of the "land", but of any "mineral deposits", or of stone, gravel, and "other materials" in the land, thus clearly indicating that title to minerals passed to the railroad company.[6]

Two statutes drew a distinction between a railroad and a turn-pike or highway, declaring that, in the case of the railroad "the title * * * shall be absolutely vested in fee simple", but that in the case of the turn-pike or highway, "the right of way only shall be so vested".[7] Some declared that upon entry of the decree, the former owner should be divested of or barred from all right or interest in the land taken.[8]

And in five states the law provided that the decree should have the same effect as a voluntary conveyance of the land.[9]

Two of these statutes were passed in 1827 and 1828; 22 between 1830 and 1840; 4 between 1840 and 1850; 13 between 1850 and 1860; 17 between 1860 and 1870; and 10 between 1870 and 1880, so that they covered the entire period of the Congressional grants and some 23 years prior thereto.

It must be concluded therefore that, so far as legislative usage throws any light upon the question, the term "right of way" when used in legislative enactments prior to 1875, invariably referred to the land itself and not the incor-

[5]See statutes listed in Note 5, Appendix B to this brief.
[6]See statutes listed in Note 6, Appendix B to this brief.
[7]See statutes listed in Note 7, Appendix B to this brief.
[8]See statutes listed in Note 8, Appendix B to this brief.
[9]See statutes listed in Note 9, Appendix B to this brief.

poreal right in the land, and invariably contemplated ownership in fee. The meaning of the term "right of way", as used in Congressional grants and as disclosed by other provisions of the grants themselves, will be discussed later.

Judicial decisions seem to support the same usage.

We have not been able to locate any decision during the period prior to 1849, when the first Congressional grant was enacted. But in 1852 the Supreme Court of Vermont, while holding that the railway company would not take a fee simple estate under the statutes of Vermont, pointed out that the New York courts took a different view because, "in the railroad charters of that state, it is provided that the company may take the fee of the land." *Quinby vs. Vermont Central R. R. Co.*, 23 Vt. 387 at 393. And in 1856 in *Blake vs. Rich*, 34 N. H. 282, it appears that, in New Hampshire, the railroad took only a lease of "the right to construct a railroad", but the court refers to "numerous cases in other states, where it has been holden that the fee in lands taken vests in the railroad."

In the libraries available to us, we have not been able to locate either the earlier New York decisions referred to in *Quinby vs. Vermont Central*, or the "numerous cases in other states" referred to in *Blake vs. Rich*, but the statements of the court in these two cases would indicate that there had been numerous earlier decisions supporting the fee simple estate, and they also indicate that there were no other decisions denying the fee, since none are referred to.

In 1854, in *Chicago & Miss. R. Co. v. Patchin*, 16 Ill. 198, the court indicated that the estate of the railroad was

an absolute ownership in fee, and similar statements were made in *Prather v. Western Union Tel. Co.*, 89 Ind. 501 (1883); *Yates v. Van De Bogert*, 56 N. Y. 526 (1874); *Buffalo Pipe Line Co. v. N. Y. L. G. & W. R. Co.*, 10 Abb. N. C. 107 (1882); *Ballard v. L. & N R. Co.*, 9 Ky. Law Reports 523, 5 S. W. 484 (1887).

The leading cases in support of the easement theory, which are cited in the opinion of the Circuit Court of Appeals (R. 124), were *Penn. S. Valley R. Co. vs. Reading Paper Mills*, 149 Pa. 18, 24 Atl. 205, decided in 1892; *Kansas City R. Co. v. Allen*, 22 Kan. 285, 31 Am. Repts. 190, decided in 1879; and *Smith v. Hall*, 103 Iowa 95, 72 N. W. 427, decided in 1897. In *Penn. S. Valley R. Co. v. Reading Paper Mills, supra*, the court referred to the surface ownership conception as a "newly invented interest in land". This was in 1892, forty-three years after the first Congressional grant, and seventeen years after the last one. The only cases that we know of prior to 1875, which do not support the fee simple view, are the two cases from New Hampshire and Vermont above referred to, and in those cases the courts seemed to imply that they stand alone and that all other known cases at that time supported the fee simple estate.

In the opinion of the Circuit Court of Appeals in this case (R. 125), the majority opinion says "It is claimed that the majority of the not very numerous state decisions upon this question, prior to 1875, upheld the view that a railroad has the fee in the land over which its right of way passes. We assume this to be true."

It must be concluded therefore that the invariable practice in legislative enactment, and that the almost invar-

iable practice in judicial statement, during and prior to the period of the Congressional grants, was to use the term "right of way" as meaning the land itself, and to imply fee ownership.

The provisions of the Congressional grants indicate that Congress itself used the term "right of way" in the sense of strip of land.

Several of the earlier acts expressly granted a "*strip of land* through the public lands" instead of a "right of way through the public lands." *Leavenworth City R. R. Grant*, 14 Stat. 212; *Green Bay and Lake Pepin Grant*, 16 Stat. 388; *Portland, Dalles & Salt Lake Grant*, 17 Stat. 52; *Central Pacific Grant*, 18 Stat. 306; *Hot Springs R. R. Grant*, 19 Stat. 108; *Western R. R. of Minn. Grant*, 21 Stat. 69.

There was nothing about any of the last mentioned railroads or any of the last mentioned grants to indicate that Congress intended to grant a different kind of estate to these railroads, and no reason appears why it should have done so. It seems clear that Congress used the terms "strip of land" and "right of way" as being interchangeable and synonymous, and that while the term "right of way" was generally used, the term "strip of land" was occasionally used as being synonymous.

And several of the grants in which the term "right of way" is used bear internal evidence that they were intended to create a fee estate. Five of the grants passed between 1850 and 1872 contained condemnation provisions permitting the railroads to appropriate private lands for

"right of way" and made it clear that the right of way so appropriated was to be held in fee. For example in Section 7, of the Northern Pacific Grant, 13 Stat. 365, the company was authorized "to enter upon, purchase, take and hold *any lands or premises* that may be necessary and proper for the construction and working of said road, not exceeding in width 200 feet on each side of the line of its railroad", etc. Upon payment, the company shall *"acquire full title to the same for the purposes aforesaid."* Payment shall "vest in said company the *title of said land* and the right to use and occupy the same." "The title of the company to the *lands taken"* shall not be impaired by neglect of any guardian. If any party shall have a leasehold or subordinate interest, "the value of any such estate, *less than a fee simple"*, shall be determined, etc. Where the land is unoccupied, the company may institute proceedings for the purpose of "ascertaining the value of, and of acquring *title* to the same." The full text of the appropriation provision in the Northern Pacific Grant, 13 Stat. 365, which is typical of all, is set forth in Appendix C of this brief.

In the Senate bill which was finally superseded by the Act of March 3, 1875, Section 9 contained provisions similar to those above quoted, and the debates in the Senate in 1874 and 1875 are replete with statements that the intent was to give the railroads an absolute fee simple title in the entire property. In the Congressional Record of the 43rd Congress, First Session, page 2899, Senator Wright said "that is to say, after they have paid the money, the *title becomes absolute* in the railroad company * * *. It vests in them the *absolute title of said land* and the

right to use and occupy the same for the construction, maintaining and operating of the road of said corporation, *not merely the right to use and occupy it for that purpose,* but it vests in them *title to the lands.*"

Senator Stewart said "They are to have it (the condemned private land) for the purpose of a right of way * * *. They have only the *right of way* and they take the *land* for this purpose * * * and then they shall have the *absolute title to it* * * *."

These appropriation provisions seem to indicate conclusively that during the period of the railroad grants, when Congress referred to a railroad right of way, it had in mind not an easement but the strip of land itself to be held in fee. The appropriation provisions above referred to, which were set forth in full in the Northern Pacific grant, were adopted in Section 3 of the Act of March 3, 1875, under which petitioner obtained its right of way.

The fact that the earlier grants in each case were made to the grantee and its "successors and assigns", that the grant of right of way was "through" the public lands and not "over" them, that there were provisions to extinguish the Indian title where the grants passed through Indian lands (see Sec. 8, 13 Stat. 365), and that the grants recite in each case that they are made for the "public advantage and welfare" and provide for free transportation of troops and munitions and give the Government the right of "preferred" transportation, all afford additional indications that Congress had no intention of reducing the granted estate to the minimum.

The term "right of way" to designate the strip of land itself is still universally used in statutes and railroad conveyances and is common in private deeds and such use is supported by dictionaries.

Statutes requiring fencing of the right of way strip, removing weeds therefrom, or providing for crossings for highways, canals, irrigation ditches, etc., seldom or never use the term "strip of land occupied by tracks" and invariably use the term "right of way", although they are of course referring to the land itself and not an easement. See, for example, Sections 6551, 6552 and 7110 of the Revised Codes of Montana, 1935. There are hundreds of similar statutes, all referring to the strip of land itself as a "right of way".

In some cases Congress itself, as well as state legislatures, has used both the term "strip of land" and the term "right of way" referring to the same land and in the same statute. 18 Stat. 396, granted to the Central Pacific Railroad Company "a *strip of land* 100 feet wide on each side of the center line of said road through the public lands", and in a later part of the act enacted "thereafter all lands over which the line of said road shall pass shall be sold, located, or disposed of by the United States, subject to such *right of way* so located as aforesaid". In Statutes of Indiana for 1863, page 33, Section 5, it is provided: "When any such corporation shall have procured the *right of way*, it shall be seized in *fee simple* of the *lands*."

From a very early time in railroad history it has been the universal practice in conveyances or mortgages of extensive railroad properties, to first make a general grant

of the line of railroad between two termini and then to enumerate the different items of component property in great particularity and detail. Main track, side track, second track and switches; grades, excavations, roadbed and tunnels; stations, shops, roundhouses, bridges, turntables; locomotives, passenger cars, freight cars, cabooses, hand cars; machines, tools, and equipment; telephone and telegraph poles and wires; all are enumerated in detail. In the case of lands, the same particularity is used. Station grounds, yard grounds, shop sites, etc., are specified by name. And when it comes to the most important property of all, the site or strip of land occupied by the main line tracks, the term universally employed has always been "right of way". In spite of the detail and particularity which has been considered desirable, it has never been considered necessary to mention the strip of land occupied by the road tracks, even though owned in fee simple, by any other terminology than "right of way".

Example of this may be found in Montana public records, Volume E, page 80; Volume 1 of Mortgages, page 3; Volume 10 of Mortgages, page 1; Book O of Deeds, pages 127, 220-317; Volume 3 of Railroad Deeds, Mortgages and Leases, page 148; Book 6 of Mortgages, pages 4, 39 and 110.

Where a strip of land deeded to a railroad has been designated as a right of way in a private deed, the courts have frequently regarded this as a grant of the land in fee.

Ballard v. L. & N. R. Co. (1887), 9 Ky. Law Reports 523, 5 S. W. 484.

Stevens v. Galveston R. Co. (Tex.), 212 S. W. 639.

Radetsky v. Jorgensen, 70 Colo. 423, 202 Pac. 175.

Arkansas Improvement Co. v. Kansas City Southern Ry., 189 La. 921, 181 So. 445.

Johnson v. Valdosta R. Co., 169 Ga. 559, 150 S. E. 845.

Midstate Oil Co. v. Ocean Shore R. Co., 93 Cal. App. 704, 270 Pac. 216.

Marland v. Gillespie, 168 Okla. 376, 33 Pac. (2d) 207.

Some of the dictionary definitions are as follows:

Webster's New International 1937: "The land other than storage or station yards occupied by a railroad for its tracks, especially for its main line; also the strip of land over which a public road is built."

Funk & Wagnall's 1932: "The strip of land acquired by a company * * * by easement, by condemnation, or by purchase for the use of its structures."

New Century 1927: "A path that may lawfully be used; specifically the strip of land traversed by a railroad."

The grant was not a gratuity and there would be no object in retaining the minerals in the government. The consideration far outweighed the value of the grant, which therefore requires a liberal construction.

A 200 foot right of way strip contains approximately 25 acres to the mile, and, at the going price of $1.25 per acre, the value of the fee simple title to the right of way was $32.50 per mile. The purpose of the grant was to permit or secure the construction of a railroad useful for national defense and for strengthening economic and political unity, which would require the investment of private funds of some $25,000 to $100,000 per mile.

When the earlier grants were made it was customary to increase the price of the adjoining lands remaining in the public domain from $1.25 per acre to $2.50 per acre. Ten miles of public land on each side of the railroad would contain 12,800 acres, and the increase in selling price in this strip would amount to $16,000 per mile.

A reduction of the estate granted from a fee to an easement would benefit no one, because it is conceded that the possession of the railroad is exclusive. If the railroad cannot remove minerals, no one else can. *Rio Grande Western R. R. v. Stringham*, 239 U. S. 44, 60 L. Ed. 136, 36 S. Ct. 5. Reducing the estate of the railroad would not benefit homesteaders on adjoining land, and there would be no object in reducing the estate to an easement. It would simply freeze the minerals in place.

The Northern Pacific grant in 1864 granted alternate sections for 20 miles on each side of the railroad, containing nearly 13,000 acres to the mile, or 500 times the right of way acreage. In these 13,000 acres Congress not only granted the fee, but specifically included coal and iron lands, and some of the grants included all minerals except gold and silver. In a statute displaying the rather lavish prodigality displayed in granting 13,000 acres in fee including minerals, it would be surprisingly inconsistent to find Congress thriftily reserving the fee and the minerals in the 25 acres of right of way and reducing the value of the grant from $32.50 per mile to some still smaller amount, especially where the reservation would benefit no one, because no one but the railroad could get at the minerals, and when the books indicate that up to that time no one had ever thought of giving a railroad anything but the fee

ownership of its right of way strip, and when the building of railroads on easements had not been thought of.

This Court has held that while gratuitous public grants, such as grants of adjacent sections, are to be strictly construed against the grantee and in favor of the sovereign, this rule does not apply to the right of way grants.

In *Great Northern Railway v. Steinke*, 261 U. S. 119, at 124, 67 L. Ed. 564, 43 S. Ct. 316, it was held that the purpose of the grant of 1875 was to enhance the value and hasten the settlement of the public lands and that because of this

> "the act has been regarded as requiring a *more liberal construction* than is accorded to private grants or to the extensive land grants formerly made to some of the railroads."

In *Nadeau v. Union Pacific R. Co.*, 253 U. S. 442, at 444, 64 L. Ed. 1002, 40 S. Ct. 570, the court said in regard to a right of way grant:

> "This provision is not to be regarded as bestowing bounty on the railroads; it stands upon a somewhat different footing from private grants and should receive liberal construction favorable to the purposes in view. United States v. D. & R. G. R. R., 150 U. S. 1, 8, 14."

The granting of a fee estate would not go beyond the purpose of the act.

Counsel argue that the purpose of the grant was merely to give a right of passage over the public lands; that an easement was all that was necessary to accomplish that purpose; that the minerals were not necessary to enable the

railroad to cross the public lands; and that no grant of the minerals was contemplated.

All this would generally be equally true in the case of most homestead patents and most deeds of farms or factory sites. In 99 deeds out of 100 all that the grantee really needs for the purposes of the deed is exclusive use of the surface. When land is transferred, it is seldom that the possibility of minerals is thought of or that there is any deliberate purpose or intent to convey or receive any minerals. And yet in 99 deeds out of 100 it is a fee title which is conveyed, and minerals, if there are any, go with it, not because the minerals were thought of, but because they are an incident of the fee. So that the fact that a grant of minerals was not thought of or contemplated, and that the mere right to use the surface would accomplish the purpose of the deed or grant, proves nothing.

And there is no foundation for the statement that the purpose or object of the grant was to convey a mere right of passage or any other particular form of estate—either an easement or a fee. The purpose of the grant was to get railroads built, by providing sites or locations for their construction across public lands. This purpose could be accomplished just as effectively and perhaps more effectively by granting a strip in fee than by an easement.

If it could be shown in some way that Congress had been seeking that form of grant which would give the absolute minimum estate to the railroads and still make it possible for the roads to be built, it might follow that they would have selected an easement. However, there is no evidence that Congress was seeking such a minimum estate. From 1850 to 1870 while they were making right of way grants,

they were also making lavish gifts of adjoining sections, including coal and iron lands. No disposition was shown to whittle down any part of the grant to the lowest possible minimum. The generous width of 200 feet, and 400 feet in the Northern Pacific grant, when 50 feet would have been sufficient at most points, proves this.

It was never the practice or policy of Congress to grant surface rights and reserve underlying minerals.

The Government claims that prior to 1875 it had become the policy of the Congress to reserve minerals underlying public lands. This is not true. It had become the policy to reserve mineral *lands* from ordinary patents. But mineral lands were never excepted from *right of way* grants, and in no case had Congress ever granted surface rights and severed and reserved the underlying minerals. The only purpose of reserving mineral lands was to make them available to mineral claimants, but there could be no such object as this in reserving minerals under the right of way, because mineral claimants could not enter the right of way to conduct mining operations.

Debates in House of Representatives did not refer to character of estate granted.

A Senate bill for which was substituted a House bill which later became the Act of March 3, 1875, contained elaborate provisions including one for Federal incorporation of railroad companies. During the debates in the House of Representatives when the Act of March 3, 1875,

was under consideration, a question was raised by some of the representatives as to whether the proposed act would deprive the states of jurisdiction over intrastate freight rates. One or two of the representatives pointed out in reply that the House bill, unlike the Senate bill, did not provide for Federal incorporation but simply granted a right of way and nothing more. In the arguments below counsel for the Government contended that this statement, that the act "granted a right of way and nothing more", meant that it granted an easement and no greater estate. The context however makes it clear that what the representatives meant to say was that the proposed bill granted a site for the railroad and nothing more—that is, no Federal incorporation.

The opinion of the Circuit Court of Appeals does not mention this argument and apparently the Court felt that it had no merit. We mention it here merely because the Government stressed it emphatically in the lower courts and may stress it again here. An examination of the context will make it clear that the debaters were not referring to the character of the estate granted and that this subject was not under consideration, but that they were pointing out merely that there was no provision in the act for Federal incorporation or any other provision which might deprive the states of jurisdiction.

In accordance with the foregoing considerations, 12 decisions of the Supreme Court and every decision ever rendered by a state or lower federal court construing the right of way grants, except the decision now at bar, have uniformly held over a period of more than 50 years that the estate granted by the federal grants was a fee title, conditioned only upon continued railroad operation.

In *Joy v. St. Louis*, 138 U. S. 1, 44, 34 L. Ed. 843, 11 S. Ct. 256, the Court said:

> "Now the term 'right of way' has a two-fold signification. It is sometimes used to describe a right belonging to a party, a right of passage over any tract; and it is also used to describe that *strip of land* which railroad companies take upon which to construct their road-bed. *That is the land itself and not a right of passage over it.*"

In *New Mexico v. United States Trust Co.*, 172 U. S. 171, 43 L. Ed. 407, 19 S. Ct. 128, it is pointed out that where an intermittent non-continuous use is contemplated, it is reasonable to interpret a grant of right of way as a mere easement, but *where the use is to be continuous and embraces the entire beneficial occupation and use of the land, the presumption is in favor of a fee.*

In *Rio Grande Western R. Co. v. Stringham*, 239 U. S. 44, 60 L. Ed. 136, 36 S. Ct. 5, there was involved a question whether the railway company could enjoin the removal of minerals underlying its granted right of way strip, where the grant of a mineral patentee overlapped the right of way. The Court said:

"The right of way granted by this and similar acts is neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted, *and carries with it the incidents and remedies usually attending the fee.*"

In *Northern Pacific Railway v. Townsend*, 190 U. S. 267, 47 L. Ed. 1044, 23 S. Ct. 671, the Court said:

"* * * The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad *just as though the land had been conveyed* in terms to have and to hold the same so long as it was used for the railroad right of way. In effect *the grant was a limited fee,* made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted."

In *M. K. & T. Ry. Co. v. Roberts*, 152 U. S. 114, 38 L. Ed. 377, 14 S. Ct. 496, the Court made the following statements:

Page 116:

"The United States had the right to authorize the construction of the road of the Missouri, Kansas & Texas Railway through the reservation of the Osage Indians and to grant absolutely *the fee of the two hundred feet* as a right of way to the company."

Page 117:

"That grant (of right of way) was absolute in terms, covering *both the fee* and the possession."

Page 122:

"* * * the grant of right of way under the Act of Congress of July 26, 1866, to the Missouri, Kansas & Texas Railway and the *title of the lands* composing that right of way had become vested in that company."

In *M. K. & T. Ry. Co. v. Oklahoma*, 271 U. S. 303 at 308, 70 L. Ed. 957, 46 S. Ct. 517, the Court said:

> "The company owned its *right of way lands* and station grounds *in fee.*"

In *Noble v. Oklahoma City*, 297 U. S. 481, at 494, 80 L. Ed. 816, 56 S. Ct. 562, the Court said:

> "Assuming, for the sake of argument, that the Act of 1888 granted the railroad a base or limited fee, *as does the General Railroad Act of March 3, 1875* * * *."

In *Clairmont v. United States*, 225 U. S. 551, at 556, 56 L. Ed. 1201, 32 S. Ct. 787, the Court said:

> "Thus, by the grant of Congress the railroad company obtained the fee *in the land* constituting the 'right of way'."

In *Buttz v. Northern Pacific Railway*, 119 U. S. 55 at 66, 30 L. Ed. 330, 7 S. Ct. 100, the Court said:

> "At the time the Act of July 2, 1864 (the Northern Pacific grant) was passed, the title of the Indian tribes was not extinguished. But that fact did not prevent the grant of Congress from operating to pass the *fee of the land* to the company. The fee was in the United States. The Indians had merely a right of occupancy, a right to use the land subject to the dominion and control of the government. The grant *conveyed the fee* subject to this right of occupancy."

In *Choctaw R. R. v. Mackey*, 256 U. S. 531, at 538, 65 L. Ed. 1076, 41 S. Ct. 582, the Court said:

> "The railroad's interest, as stated in Rio Grande Western v. Stringham, 239 U. S. 44, 47, is 'neither a mere easement, nor a fee simple absolute, but a limited

fee, made on an implied condition of reverter in the event that the company ceases to retain the land for the purposes for which it is granted, and carries with it the *incidents and remedies usually attending the fee*'. In effect the railroad is the absolute owner of the *land*. Its use is, and necessarily must be, exclusive."

In *Noble v. Union River Logging Railroad*, 147 U. S. 165, at 176, 37 L. Ed. 123, 13 S. Ct. 271, the Court said:

"The uniform rule of this court has been that such an act was a grant *in praesenti* of *lands* to be thereafter identified."

This language is quoted with approval in *Jamestown and Northern Railroad Company v. Jones*, 177 U. S. 125, at 130, 44 L. Ed. 698, 20 S. Ct. 568.

In *United States v. Michigan*, 190 U. S. 379, at Page 398, 47 L. Ed. 1103, 23 S. Ct. 742, the Court said:

"We have just held in *Northern Pacific Company v. Townsend*, *ante* p. 267, in reference to a grant of a right of way for the railroad, that it was 'in effect *a grant of a limited fee*, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted.'"

In *Northern Pacific Ry. Co. v. Ely*, 197 U. S. 1 at page 6, 49 L. Ed. 639, 25 S. Ct. 302, the Court said:

"In effect *the grant was of a limited fee*, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted."

In *Stalker v. Oregon Short Line*, 225 U. S. 142, at 146, 56 L. Ed. 1027, 32 S. Ct. 636, the Court said, speaking of the Act of 1875:

> "The uniform construction of this act has been that it is a grant '*in praesenti* of *lands* to be thereafter identified.'"

State decisions construing the Congressional grants have been uniformly to the same effect.

State v. Northern Pacific Ry. Co., 88 Mont. 529, 295 Pac. 257.

Denver & S. L. R. R. v. Pacific Lbr. Co., 86 Colo. 86, 278 Pac. 1022.

Stepan v. Northern Pacific Ry., 81 Mont. 361, 263 Pac. 425.

Dugan v. Montoya, 24 N. M. 102, 173 Pac. 118.

Union Pacific R. R. v. Davenport, 102 Kan. 513, 170 Pac. 993.

Crandall v. Goss, 30 Ida. 661, 167 Pac. 1025.

Bowman v. McGoldrick Lbr. Co., 38 Ida. 30, 219 Pac. 1063.

Northern Pacific Ry. v. Myers-Parr Mill Co., 54 Wash. 447, 103 Pac. 453.

Wilkinson v. Northern Pacific Ry., 5 Mont. 538, 6 Pac. 349.

The Government admitted in its brief below that the clause granting "a right of way through the public lands", as repeatedly used for 25 years in earlier grants, granted a fee (and impliedly that the railroads which obtained their right of way under the earlier grants had the right to drill for oil), and gave no adequate reason for denying similar right to grantees under the Act of March 3, 1875.

After referring to the liberal land grant policy prevailing prior to 1875, the Government on page 8 of its brief below said: "With such a policy prevailing, it is not surprising to find that the courts have construed such grants as conveying to the railroads a fee in their right-of-way. After all, if Congress was willing to grant to the Northern Pacific the alternate sections in a belt of land 80 miles in width, it is difficult to gainsay that railroad's claim of a fee in the very lands on which its tracks are laid".

Judge Wilbur in his dissenting opinion (R. 138) said: "As stated in the main opinion the Government concedes that in many prior grants of rights of way to railroads, it was the intention of Congress to convey a fee 'limited only by the possibility of reverter'."

Only two possible reasons are given for applying a different construction to the same identical granting words in the Act of March 3, 1875. One is that in 1872 Congress passed a resolution declaring that subsidies in public lands should be discontinued and "the public lands should be held *for the purpose of securing homesteads to actual settlers* and for educational purposes, as may be provided by law".

It is obvious that the reduction of the estate in the right of way from a fee to an easement would not tend to se-

cure homesteads for actual settlers or accomplish any educational purpose. The fact that Congress abandoned the policy of granting alternate adjacent sections in the aid of construction, in order to preserve lands for homesteaders, affords no indication whatever that it intended to change the character of the estate in the right of way, especially when it continued to use the same identical granting clause which it had been using for the past 25 years in granting fee titles.

The only other reason for reversing the effect of the grant of a "right of way through the public lands" in the Act of March 3, 1875, is that Section 4 of the later act contained a provision permitting the railroad to obtain its right of way in advance of construction by filing of a location map, and provided that thereafter the lands over which such right of way shall pass should be disposed of subject to such right of way. The argument is that lands cannot be disposed of "subject" to a right of way, unless the right of way is a mere easement, and it is therefore urged that this provision in Section 4 for disposing of adjacent lands must be held to have qualified the grant in Section 1, in spite of the fact that Congress continued to use the identical granting words which had previously been used to grant a fee title.

One difficulty with this argument is that the provision for subsequent disposition of the lands over which the right of way shall pass did not originate with the Act of 1875, but first appeared in Section 2 of the *Portland, Dalles & Salt Lake Grant*, 17 Stat. 52, approved April 18, 1872. And it is significant that that Act granted not a right of way through the public lands but "a *strip of land* one

hundred feet wide on each side of the centre line of said road". Here it is a "strip of land" and not a "right of way" which was granted, and yet provision is made for disposing of the lands over which the line of road shall pass, "subject to such right of way so located". The Act of 1875 simply borrowed this language from the Act of 1872. It seems perfectly clear that the purpose in both acts was to provide for the preserving of the right of way strip after the filing of the map of location and for the disposition only of the balance of the subdivisions through which the map of location might run. This is pointed out so forcefully in Judge Wilbur's dissenting opinion below (R. 141-147), that we will not attempt to repeat or summarize his arguments, but respectfully refer the Court to that portion of Judge Wilbur's opinion commencing near the top of page 141 and continuing to page 147.

We submit that after Congress had used a grant of "the right of way through the public lands" for 25 years to convey a fee title, and if it had then decided to reverse its policy and reduce the estate to an easement, it would have been perfectly absurd for it to continue to use the same granting words and to expect that the farfetched inference from the language in Section 4 would be sufficient to make clear to the courts and the people, its intention to adopt a new form of estate for the right of way.

The prohibition against alienaton of the right of way does not apply to removal of oil.

In *Northern Pacific Ry. v. Townsend*, 190 U. S. 267, 47 L. Ed. 1044, 23 S. Ct. 671, and in *Great Northern Ry. Co.*

v. Steinke, 261 U. S. 119, 67 L. Ed. 564, 43 S. Ct. 316, it is held that a third party could not obtain title by adverse possession to any part of the right of way strip or station grounds covered by these right of way grants; that the whole of the granted right of way must be presumed to be necessary for the purposes of the railroad; and that nothing was granted for private use or disposal, nor beyond what Congress deemed reasonably essential, presently or prospectively, for the quasi public uses indicated.

The Government argues that under these decisions, since no part of the right of way can be *alienated* for private use, it follows that no part can be *used* even temporarily for private purposes, and that oil cannot be removed therefrom.

The prohibition against alienation arises from the condition subsequent which requires that the entire width of the right of way be used, or at least held available for use, for railroad purposes. If a portion of the surface were alienated, that portion would no longer be available for present or future public use and the grant thereof would fail.

This would not be true of any temporary occupation of a portion of the surface under revocable permit for private use. And the removal of oil would not affect the fullest possible use of the right of way for railroad purposes, either presently or prospectively, any more than would the removal of water from a well, and the complaint makes no allegations that there would be any such interference. It has frequently been held that use of the right of way for private purposes, either by the railway company or

under revocable permit to others, is not a breach of the condition.

Grand Trunk R. Co. v. Richardson, 91 U. S. 454 at 463, 23 L. Ed. 356;

Hartford Fire Ins. Co. v. Chicago, etc. Ry., 175 U. S. 91, 99, 44 L. Ed. 84, 20 S. Ct. 33, 36;

Sioux City v. Missouri Valley Pipe Line Co., 46 Fed. (2d) 819;

Northern Pacific R. Co. v. Northern American Telephone Co., 230 Fed. 347, 349;

Holland Co. v. Northern Pacific Ry. Co., 214 Fed. 920.

In *M. K. & T. Ry. v. Oklahoma,* 271 U. S. 303, 70 L. Ed. 957, 46 S. Ct. 517, it was held that the railway company was entitled to compensation where crossing rights were acquired by a city over granted right of way, and in *Northern Pacific R. Co. v. Meyers-Parr Mill Co.,* 54 Wash. 447, 103 Pac. 453, it was held that the railway company could recover the value of timber removed by a trespasser for private purposes from the granted right of way.

Even where private right of way deeds have been involved, the cases declaring the estate of the railroad to be a fee simple, outweigh those holding it to be an easement.

It is our opinion that the state court decisions involving private deeds should be given little consideration in view of the repeated interpretations by the Supreme Court of the United States of the Congressional grants themselves. However, the Government laid great stress below upon state court decisions holding that railroads have only an

easement in right of way obtained by condemnation or private deed, and the majority opinion below (R. 124) seems to concede considerable effect to these decisions.

In view of this we take the liberty of referring the court to the following decisions holding the estate granted to have been a fee. Cases on both sides are cited in a footnote to *Magnolia Petroleum Company v. Thompson*, 106 F. (2d) 207, at 227, and we submit that the following cases upholding the fee estate greatly outweigh those to the contrary.

Carter Oil Co. v. Welker, 112 Fed. (2d) 299;

Midstate Oil Co. v. Ocean Shore R. Co., 93 Cal. App. 704, 270 Pac. 216;

Radetsky v. Jorgensen, 70 Colo. 423, 202 Pac. 175;

Johnson v. Valdosta R. R., 169 Ga. 559, 150 S. E. 845;

Chicago and Mississippi R. R. v. Patchin, 16 Ill. 202;

Ballard v. L. & N. R. Co., 9 Ky. Law Reports 523, 5 S. W. 484;

Arkansas Improvement Co. v. Kans. City So. Ry., 189 La. 921, 181 So. 445;

Nelson v. Texas & Pacific R. R., 153 La. 117, 92 So. 754;

Dolby v. Dillman, 283 Mich. 609, 278 N. W. 694;

Luedeke v. C. & N. W., 120 Neb. 124, 231 N. W. 695;

Buffalo Pipe Line Co. v. N. Y. L. G. & W. R. Co., 10 Abb. N. C. (N. Y.) 107;

Quinn v Pere Marquette Ry., 256 Mich. 143, 239 N. W. 376;

Battele v. New Haven Ry., 211 Mass. 442, 97 N. E. 1004;

Marland v. Gillespie, 168 Okla. 376, 33 Pac. (2d) 207;

Sherman v. Sherman, 23 S. D. 486, 122 N. W. 439;
Stevens v. Galveston R. Co. (Tex.), 212 S. W. 639;
Messer v. Oestreich, 52 Wis. 684, 10 N. W. 6;
Keynerd v. Hulen, 5 Fed. (2d) 160 (cert. denied 269 U. S. 560, 70 L. Ed. 411, 46 S. Ct. 1);
Gilbert v. M. K. & T. R. R., 185 Fed. 102;
Supervisors, Warren County v. Patterson, 56 Ill. 111;
Tinker v. Forbes, 136 Ill. 221;
Downen v. Rayburn, 214 Ill. 342;
Concklin v. New York C. & H. R. R. Co. (1912), 149 App. Div. 739, 134 N. Y. Supp. 191 (appeal of which was dismissed in 207 N. Y. 752, 101 N. E. 1099);
Colgate v. New York C. & H. R. R. Co. (1906), 51 Misc. 503, 100 N. Y. Supp. 650;
Phillips Gas & Oil Co. v. Lingenfelter, 262 Pa. 500, 105 Atl. 888, 5 L. R. A. 1495;
Nesral Production Co. v. St. Louis, B. & M. Ry. Co. (Texas), 84 S. W. (2d) 805;
Cincinnati R. & Ft. W. R. Co. v. C. C. & St. L. R. Co. (Ind.), 123 N. E. 1;
Indianapolis P. & C. R. Co. v. Rayl, 69 Ind. 424;
Carr v. Miller (1921), 105 Nebr. 623, 181 N. W. 557;
Switzer v. Chaffee County, 70 Colo. 563, 203 Pac. 680;
Clevenger v. Chicago, M. & St. P. R. Co. (1919) (Mo.), 210 S. W. 867;
Ft. Worth & D. C. Ry. Co. v. Ayers (Tex.), 149 S. W. 1068.

Subsequent rulings of the Land Department and acts of Congress supporting the easement theory are self-serving declarations, and are in conflict with Supreme Court decisions, with the intent of the grants and with admissions by the government in this case.

It appears from the opinion below (R. 130-134) that the Circuit Court of Appeals relied largely upon rulings of the Land Department and Acts of Congress, long after the period of the grants, indicating a view that the estate granted to the railroads in their right of way was an easement and not a fee.

The Land Department rulings are somewhat conflicting. The first of them was issued nearly 40 years after the first right of way grant and 13 years after the last one. The acts of Congress which the court refers to are still later. While technically admissible, these rulings are self-serving declarations, and were made so long after the grants that they lose their persuasive force.

The views expressed are contrary to the uniform holdings of this court that the estate granted was not an easement but a determinable fee. They ignore and were apparently made in ignorance of the fact that a railroad right of way was invariably regarded as a fee estate, both in legislative enactments and judicial statements during and prior to the period of the grants.

These rulings applied to the earlier grants as well as the Act of 1875 and, as to the earlier grants, they are contrary to the admissions made below in this case by the Government and above referred to, to the effect that the estate granted by the earlier acts was not an easement but a fee.

The owner of a conditional fee estate is entitled to the underlying oil and minerals.

This proposition has not been disputed by the Government nor by the lower court. It is well settled that the owner of a base or limited fee, until the determination of his estate, has all of the rights of a fee simple owner and has as complete dominion over the land for all purposes as though he held it in fee simple.

21 C. J. 923;

10 R. C. L. 652, 653;

Washburn on Real Property, 6th Ed., Sec. 168;

First Universalist Soc. v. Boland, 29 N. E. 524, 155 Mass. 171;

Hillis v. Dils, 100 N. E. 1047, 53 Ind. App. 576;

Fox v. Van Fleet, 170 S. W. 185, 160 Ky. 796, 799;

Landers v. Landers, 151 S. W. 386, 151 Ky. 206;

Matthews v. Hudson, 7 S. E. 286, 81 Ga. 120;

Des Moines R. Co. v. Des Moines, 159 N. W. 450.

Accordingly railroad companies are accorded the right to drill for oil on right of way held in fee.

40 *Corpus Juris* 962;

51 *Corpus Juris* 573, Sec. 237;

Montana Mining Co. v. St. Louis Mining Co., 204 U. S. 204, 217, 51 L. Ed. 444, 27 S. Ct. 254;

Nelson v. T. & P. R. Co., 92 So. 754, 152 La. 117;

Crowell v. Howard, (Tex.), 200 S. W. 911;

Quinn v. Pere Marquette R. Co., 239 N. W. 376, 256 Mich. 143;

Brightwell v. Intl. Grt. N. R. Co., 49 S. W. (2d) 437, 121 Tex. 338;

Kynerd v. Hulen, 5 Fed. (2d) 160 (C. C. A. 5th Circuit);

Atty. General v. Pere Marquette R. Co., 248 N. W. 860, 262 Mich. 431;

Gilbert et al. v. M. K. & T. Ry., 185 Fed. 102;

Rice v. Clear Spring Coal Co., 186 Pa. St. 64, 40 Atl. 149;

Stephenson v. St. L. S. W. R. Co., 181 S. W. 568;

Stevens v. Galveston H. & S. A. R. Co., 212 S. W. 639;

Carter Oil Company v. Welker, 112 Fed. (2d) 299.

Where land has been deeded for school purposes, the grantee cannot be enjoined from removing oil underlying the land. *Dees v. Chauvronts* (Ill.), 88 N. E. 1011, 240 Ill. 486. Also *Priddy v. School District,* 92 Okla. 254, 256, 219 Pac. 141.

A grant even though not in fee and limited to railroad purposes only would include the right to use materials or fuel within the bounds of the grant, and the injunction should be denied as to removal of oil for railroad fuel.

Even if our grant be limited to a right of use for railroad purposes only, this would include the right to use any materials or fuel found within the bounds of the grant, and the injunction should be denied, at least as to the removal of oil for railroad fuel. It is now uniformly conceded, even by courts leaning to the easement theory, that the estate of the railroad is more than a bare common law easement or incorporeal right. It is conceded that the railroad has the right to exclude the servient owner and to

maintain exclusive possession, and that it has the right to excavate cuts and dig tunnels below the surface, to take materials from one part of the right of way for enbankments in other parts, and to dig wells for water. There is no basis in the wording of the grant for drawing a line and permitting some of these railroad uses and denying others. Even under the more restrictive decisions, the railroad should have the right, not only to take exclusive possession of the surface, but also to use timber on the surface, and materials, water or fuel below the surface, so long as they are found within the 200 foot strip, and so long as they are used for railroad purposes only. We submit that, even though it should be held that our estate is not a fee and that we therefore have no right to use any part of the right of way for any non-railroad use, it should still be held that we have the right to use oil underlying the right of way for railroad fuel, and to this extent the opinion of the court below should be reversed and the injunction denied.

We respectfully urge therefore that a writ of certiorari be issued to review the decision of the Circuit Court of Appeals and to correct the manifest error therein.

Respectfully submitted,

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May 28, 1941.

APPENDIX A.

Act of March 3, 1875, 18 Stat. 482.

"Chap. 152. An act granting to railroads the right-of-way through the public lands of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turnouts, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

Sec. 2. That any railroad company whose right of way, or whose track or roadbed upon such right-of-way, passes through any canyon, pass, or defile, shall not prevent any other railroad company from the use and occupancy of the said canyon, pass, or defile, for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade. And the location of such right

of way through any canyon, pass, or defile shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location, and in as perfect a manner as the original road: Provided, That such expenses shall be equitably divided between any number of railroad companies occupying and using the same canyon, pass, or defile.

Sec. 3. That the legislature of the proper Territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned; and where such provision shall not have been made, such condemnation may be made in accordance with section three of the act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes, approved July first, eighteen hundred and sixty-two," approved July second, eighteen hundred and sixty-four.

Sec. 4. That any railroad company desiring to secure the benefits of this act shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed

lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way; Provided, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

Sec. 5. That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands specially reserved from sale, unless such right of way shall be provided for by treaty stipulation or by act of Congress theretofore passed.

Sec. 6. That Congress hereby reserves the right at any time to alter, amend, or repeal this act, or any part thereof.

Approved, March 3, 1875."

APPENDIX B.

Early Statutes Indicating Ownership in Fee of Lands Embraced in Railroad Rights of Way.

Note (1) Laws of California, 1850-1853, Ch. LXXV, Sec. 28, p. 267.

Revised Statutes of Colorado, 1868, Ch. XVIII, p. 132.

Laws of Dakota Territory, 1864, Ch. LXVII, Sec. 7, p. 152.

Laws of Dakota Territory (Special and Private) 1866-1867, Ch. IV, Sec. 6, p. 92, Id., Ch. V, Sec. 7, p. 101.

Laws of Georgia to 1837 (Prince's Digest) p. 301, par. 13; p. 316, par. 81; p. 320, par. 96; p. 324, par. 121; p. 336, par. 170; p. 340, par. 186; p. 342, par. 193; p. 349, par. 226; p. 363, par. 296; p. 368, par. 312; p. 376, par. 358.

Statutes of Indiana, Supp., Pub. 1862, Vol. I, Ch. 128.

Statutes of Indiana, 1863, p. 33, Sec. 3.

Statutes of Kansas Ty., 1855, Ch. 85, p. 911, Sec. 10; Ch. 86, p. 917, Sec. 9; Ch. 87, p. 923, Sec. 10; Ch. 88, p. 929, Sec. 10.

Laws of Kansas, 1864, Ch. 124, p. 326.

Laws of Missouri, 1853, p. 355, Sec. 1, 7, 9.

Revised Statutes of North Carolina, 1837, p. 340, par. 14; p. 293, par. 7; p. 410, par. 9; p. 401, par. 35; p. 363, par. 18.

Revised Code of North Carolina, 1855, Ch. 61, p. 358, par. 20.

Statutes of South Carolina, 1840, Vol. VIII, par. X, p. 359, par. X, p. 400; par. XXXV, p. 415; par. X, p. 425; par. X, p. 444; par. XIV, p. 466; par. X, p. 476.

Laws of South Carolina, 1839-1849, par. XVI, p. 404; par. XIV, p. 376; par. XVI, p. 389.

Laws of Texas, 1855-1861, Special Laws of the 7th Legislature, (1858) Ch. 51, p. 61 (1239), Sec. 10.

Code of Virginia, 1860, Title 17, Ch. 56, p. 325, par. 11.

Code of Virginia, 1873, p. 538, par. 11.

Code of West Virginia, 1870, ch. 41, p. 264, par. 18.

Revised Statutes of West Virginia, 1879, Ch. 79, Sec. 19.

Laws of Wyoming, 1869, Ch. 8, Sec. 45, p. 251.

Note (2) Code of West Virginia, 1870, Ch. 41, p. 264, par. 18.

Revised Statutes of West Virginia, 1879, Ch. 79, Sec. 19.

Laws of Virginia, Mathews Digest, 1856, Vol. I, p. 426, Sec. 11.

Laws of Texas, 1855-1861, Spec. Laws of the Fifth Legislature, (1853) Ch. V, p. 11, Sec. 10.

Laws of Georgia to 1837, (Prince's Digest) p. 320, par. 96.

Note (3) Laws of Georgia to 1837, (Prince's Digest) p. 376, par. 358.

Note (4) Comp. Laws Michigan, 1871, Ch. 75, Sec. 23, p. 758.

Swan's Rev. Statutes of Ohio, 1854 (Derby's Digest) Ch. 29, p. 235, Sec. XI.

Statute Law of New York (Diossy Edition, Vol. 3, p. 96, par. 22 (Laws of 1875, Ch. 606).

Note (5) General Laws of California, 1850-1864 (Hittell), Vol. I, p. 135, Sec. 860.
Laws of Illinois, 1852, p. 151, Sec. 15.
Compiled Laws of Nevada (1863-1873) Vol. II, p. 300, Sec. 3460.
General Laws of Oregon, 1843-1872, Title III, Sec. 47.
Statutes of Tennessee, 1858-1871, Ch. LIV, p. 48, par. 8; p. 49, par. 5.
Laws of Texas, 1855-1861, Spec. Laws of the 5th Legislature, (1853) Ch. V, p. 11, Sec. 10.
Compiled Laws, Utah, 1876, p. 213, Sec. 31.
General Stats. of Vermont, 1863, Title XIV, Ch. 28, p. 219.
Real Property Statutes, Washington Ty., 1843-1889, p. 336, Sec. 12.

Note (6) Rev. Code of Alabama, 1867, Sec. 1411.
General Laws, New Mexico, 1882, (Act of 1878) p. 457.

Note (7) Rev. Stats. of West Virginia, 1879, Ch. 79, Sec. 19.
Code of West Virginia, 1870, Ch. 41, p. 264, par. 18.
Code of Virginia, 1873, p. 538, par. 11.

Note (8) Compiled Laws of Michigan, 1857, Ch. 67, Sec. 23, p. 643.
Compiled Laws of Michigan, 1871, Ch. 75, Sec. 23, p. 758.

Rev. Stats. of New York, 1859, Vol. II, Banks & Bro. 5th Ed., p. 675, Sec. 18.

Stat. Law of New York, Diossy Ed., Vol. 3, (p. 96, par. 22) Laws of 1875, Ch. 606.

Note (9) Laws of California, 1850-1853, Ch. LXXV, Sec. 28, p. 267.

Digest of the Stats. of Louisiana, 1870, Vol. I, p. 346, par. 25.

Maryland Code Supp. 1870, Art. 26, p. 40.

Rev. Stats. of North Carolina, 1837, p. 305, par. 20.

Laws of Virginia, Tates Digest, 1841, p. 766, par. 11.

APPENDIX C.

Appropriation Provisions of the Northern Pacific Grant, 13 Stat. 365.

"Sec. 7. And be it further enacted, That the said "Northern Pacific Railroad Company" be, and is hereby, authorized and empowered to enter upon, purchase, take, and hold any lands or premises that may be necessary and proper for the construction and working of said road, not exceeding in width two hundred feet on each side of the line of its railroad, unless a greater width be required for the purpose of excavation or embankment; and also any lands or premises that may be necessary and proper for turnouts, standing places for cars, depots, station-houses, or any other structures required in the construction and

working of said road. And the said company shall have the right to cut and remove trees and other material that might, by falling, encumber its road-bed, though standing or being more than two hundred feet from the line of said road. And in case the owner of such lands or premises and the said company cannot agree as to the value of the premises taken, or to be taken, for the use of said road, the value thereof shall be determined by the appraisal of three disinterested commissioners, who may be appointed, upon application by either party, to any court of record in any of the territories in which the lands or premises to be taken lie; and said commissioners, in their assessment of damages, shall appraise such premises at what would have been the value thereof if the road had not been built. And upon return into court of such appraisement, and upon the payment into the same of the estimated value of the premises taken for the use and benefit of the owner thereof, said premises shall be deemed to be taken by said company, which shall thereby acquire full title to the same for the purposes aforesaid. And either party feeling aggrieved at said appraisement may, within thirty days after the same has been returned into court, file an appeal therefrom, and demand a jury of twelve men to estimate the damage sustained; but such appeal shall not interfere with the rights of said company to enter upon the premises taken, or to do any act necessary and proper in the construction of its road. And said party appealing shall give bonds, with sufficient surety or sureties, for the payment of any cost that may arise upon such appeal; and in case the party appealing does not obtain a verdict, increasing or diminishing, as the case may be, the award of the commissioners,

such party shall pay the whole cost incurred by the appellee, as well as his own, and the payment into court, for the use of the owner of said premises taken, of a sum equal to that finally awarded, shall be held to vest in said company the title of said land, and of the right to use and occupy the same for the construction, maintenance, and operation of said road. And in case any of the lands to be taken, as aforesaid, shall be held by any infant, femme covert, non compos, insane person, or persons residing without the territory within which the lands to be taken lie, or persons subjected to any legal disability, the court may appoint a guardian for any party under any disqualification, to appear in proper person, who shall give bonds, with sufficient surety or sureties, for the proper and faithful execution of his trust, and who may represent in court the person disqualified, as aforesaid, from appearing, when the same proceedings shall be had in reference to the appraisement of the premises to be taken for the use of said company, and with the same effect as has been already described; and the title of the company to the lands taken by virtue of this act shall not be affected or impaired by reason of any failure by any guardian to discharge faithfully his trust. And in case any party shall have a right or claim to any land for a term of years, or any interest therein, in possession reversion, or remainder, the value of any such estate, less than a fee simple, shall be estimated and determined in the manner hereinbefore set forth. And in case it shall be necessary for the company to enter upon any lands which are unoccupied, and of which there is no apparent owner or claimant, it may proceed to take and use the same for the purposes of said railroad, and may in-

stitute proceedings, in manner described for the purpose of ascertaining the value of, and of acquiring title to, the same; but the judge of the court hearing said suit shall determine the kind of notice to be served on such owner or owners, and he may in its discretion appoint an agent or guardian to represent such owner or owners in case of his or their incapacity or non-appearance. But in case no claimant shall appear within six years from the time of the opening of said road across any land, all claims to damages against said company shall be barred."